BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

AUGUSTIN HERNANDEZ	)	
Claimant	)	
	)	
VS.	)	Docket Nos. 251,574,
	)	256,098
	)	& 268,064
	)	
IBP, INC.	)	
Self-Insured Respondent	)	

ORDER

Respondent requested review of the July 14, 2003 Award entered by Administrative Law Judge (ALJ) Brad E. Avery. The Appeals Board (Board) heard oral argument on January 6, 2004.

APPEARANCES

Stanley R. Ausemus of Emporia, Kansas, appeared for the claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, the parties agreed the independent medical report authored by Dr. Daniel Downs, dated December 13, 2001, should be considered part of the record.

ISSUES

The ALJ found the opinions expressed by Dr. Vito Carabetta, the treating physician, were the most persuasive and as such, awarded benefits based upon a 5 percent functional impairment to the body as a whole. Dr. Carabetta also imposed restrictions based upon a functional capacities evaluation (FCE) and those restrictions resulted in a

task loss of 17 to 33 percent, based upon the differing vocational analyses. The ALJ gave equal weight to both, averaging the two which resulted in a 25 percent task loss.

The ALJ further found claimant's election to terminate his employment with respondent in August 2001 and enroll in a vocational program designed to train claimant in the construction industry was appropriate and reasonable under the circumstances. This effort was, according to the ALJ, proper and would effectively increase his chances of obtaining employment and replace his lost wages. Thus, the ALJ found claimant had a 100 percent wage loss at the point he voluntarily left respondent's employ in August 2001. This wage loss continued even after his graduation from the 10-month construction technology program as claimant failed to find employment in his new chosen field. The ALJ then awarded a 62.5 percent work disability, which reflects an average of the task and wage loss figures.

The respondent requests review of a single issue, that of the nature and extent of claimant's impairment. Specifically, respondent contends claimant's decision to leave his employment in August 2001 and pursue vocational training was inappropriate under these facts and circumstances. Respondent maintains claimant has failed to prove that he was unable to continue working in his accommodated position. Accordingly, respondent contends the comparable wage he was receiving at the time he voluntarily left his job with respondent should be imputed thereby negating any claim for work disability, leaving claimant with a 5 percent functional impairment. Respondent further argues that claimant has failed to establish a good faith effort to obtain appropriate employment since leaving his job with respondent.

In contrast, claimant argues the ALJ's award should be increased. First, he maintains his functional impairment is more accurately 15 to 27 percent. Next, he maintains the evidence contained within the record demonstrates a 78 percent task loss along with a 100 percent wage loss which yields an 89 percent work disability. Lastly, claimant maintains he demonstrated good faith in seeking employment that more appropriately reflects his physical limitations by attending and eventually graduating from a vocational program that has yet to yield any meaningful employment opportunities.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The parties stipulated claimant sustained a compensable series of personal injuries culminating on July 16, 1999. Respondent provided treatment through an occupational physician who ultimately referred claimant to Dr. Vito Carabetta for further evaluation and treatment.

Dr. Carabetta first saw claimant in September 1999. At that point, claimant's complaints included his upper back and neck, with the pain more significant on the right. Dr. Carabetta diagnosed "regional myofascial change", also known as myofascitis.[1] He suggested a period of physical therapy along with conservative medications to address claimant's complaints. After a three-week course of physical therapy, claimant reported no improvement. Dr. Carabetta then implemented a series of injections in claimant's upper trapezius area and with this, claimant reported some improvement.

Thereafter, Dr. Carabetta noted claimant's condition remained static although he did find the complaints might shift in prominence from one side to the other. However, at no time did claimant ever voice any low back complaints during the period of time Dr. Carabetta was involved in his care nor did Dr. Carabetta diagnose claimant with bilateral carpal tunnel syndrome.

At respondent's request, claimant was also evaluated by Dr. Jeffrey MacMillan, an orthopaedic physician, in June 2000. Dr. MacMillan testified his examination of claimant revealed no objective abnormalities. He found claimant's strength to be normal in the shoulders, upper extremities and the cervical region. He observed symmetrical reflexes and normal dermatomal sensations. Following his examination, he concluded claimant was at maximum medical improvement and issued a 0 percent functional impairment pursuant to the *Guides*.[2] He further testified claimant's condition warranted no restrictions and released him to return to work.

In November 2000, claimant returned to see Dr. Carabetta. Like Dr. MacMillan, he also found claimant to be at maximum medical improvement. During his deposition, Dr. Carabetta issued a 5 percent permanent impairment to the body as a whole based upon the AMA *Guides* (4th ed.).[3] With the aid of a functional capacities evaluation, Dr. Carabetta imposed the following restrictions:

> Occasional lifting above [the] waist should be limited to 40 pounds. Below his waist it actually can be up to 65 pounds on an occasional basis. With frequent lifting above the waist should not exceed 25 pounds and below the waist at 40 pounds.[4]

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[1] Carabetta Depo. at 8.

[2] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) (4th ed.).

[3] Carabetta Depo. at 24.

[4] *Id.* at 25.

Dr. Carabetta went on to state that any lifting at or above the shoulder level should be done only on an occasional basis. He further noted that, based upon the results of the evaluation, claimant was able to push 90.5 pounds and pull 123.5 pounds.

At the ALJ's request, claimant was examined by Dr. Daniel Downs, a board-certified orthopaedist, on December 13, 2001. Dr. Downs diagnosed myofascial pain as a result of an injury of the parascapular and neck musculature. He assigned a 15 percent permanent partial disability to the body as a whole as a result of the work-related injury. Dr. Downs suggested claimant should limit his repetitive activities at the chest level and above. Specifically, "he should not climb ladders or place himself in a position where he has to use his arms to support his upper torso or body weight."[5] He also believed claimant was able to lift up to 70 pounds occasionally but should limit his lifting and carrying.[6]

At his counsel's request, claimant was evaluated by Dr. Pedro A. Murati in August 2000 and again in May 2002. During the course of the examination in 2002, claimant's physical complaints included not only pain in both hands, arms, shoulders and into his neck but also in his low back along with numbness in both feet.[7] Dr. Murati diagnosed bilateral carpal tunnel syndrome and myofascial pain in the bilateral shoulders along with the interscapular and cervical spine. In addition, he diagnosed lumbosacral strain and left SI joint disfunction, all of which he attributed to claimant's work for respondent.

Dr. Murati assessed claimant's condition and assigned a combined impairment of 27 percent to the body as a whole. In defending his impairment evaluation, Dr. Murati conceded he utilized the range of motion model for both the lumbar strain and the cervical spine rather than the preferred DRE method. Had he utilized the DREs his overall rating would be lowered by four percentage points.[8] Dr. Murati also assigned the following restrictions:

> No ladders, crawling, heavy grasp with right or left or above shoulder level. Do not work with right or left -- or work more than 24 inches from the body, right or left or lift, carry, push, pull greater than 35 pounds. Rarely bend. Occasionally climb stairs and squat. Repetitive grasp or grab with both hands, and lift, carry, push, pull up to 35 pounds, that would be occasional.

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[5] Downs' IME report (Dec. 13, 2001) at 3.

[6] *Id.*

[7] This is the first mention of bilateral carpal tunnel syndrome and at this point, claimant had not worked for respondent for nearly a year, having voluntarily left respondent's employ in August 2001.

[8] Murati Depo. at 39-41.

. . . .

> Frequently sit, stand, walk, drive. Repetitive hand controls, both hands. And lift, carry, push, pull up to 20 pounds. Use of the wrist splints while working at home. Request use of body mechanics at all times. Alternate stand. And no use of hooks, knives or vibratory tools with both hands in an eight hour workday.[9]

Three physicians were asked to comment on claimant's task loss in light of K.S.A. 1999 Supp. 44-510e(a). According to Dr. MacMillan, claimant bears no task loss as he is able to do all of the different tasks identified by Karen Crist Terrill, respondent's vocational expert.[10] When asked to comment specifically on the last job claimant was assigned to, that of "space hot beef", Dr. MacMillan concluded, based upon his evaluation, that claimant was capable of performing that job.[11]

On the other end of the spectrum, Dr. Murati found claimant had a 71 percent task loss based upon the vocational analysis provided by James Molski.[12] However, Dr. Murati conceded claimant's actual abilities, as demonstrated by the claimant's October 2000 functional capacities evaluation, showed claimant was able to perform greater work activities than Dr. Murati's restrictions would suggest.[13]

Dr. Carabetta, the treating physician, concluded claimant's task loss was somewhere between 16.67 percent (based on Karen Crist Terrill's task analysis) and 33.33 percent (based on James Molski's task analysis). He also agreed, based upon the FCE results, claimant would be able to do the "space hot beef" job claimant was assigned to during his last six months while working for respondent.

Claimant maintains he is entitled to a significant work disability as he has been unemployed since August 2001. Up to that time, he was employed by respondent in a light duty position, paying a comparable wage. This position, titled "space hot beef", required claimant to constantly watch hanging cattle carcasses as they traveled down a mechanized rail system and maintain daylight between the carcasses by moving and adjusting them.

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[9] *Id.* at 15-16.

[10] MacMillan Depo. at 15.

[11] *Id.* at 16.

[12] Murati Depo. at 23.

[13] *Id.* at 34-35.

According to John Lichtenaur, Jr., the plant superintendent, the act of moving a carcass required no more than 30 pounds of force, unless there was some sort of problem with the rail system. Mr. Lichtenaur testified that the system was regularly maintained and rarely posed any problems for the line workers. Claimant disputes this and testified he was regularly required to push the carcasses, weighing at least 200 pounds, forcing them to move along the line. Claimant indicates this job continued to cause him pain and hurt his low back.

Claimant worked in the "space hot beef" position for six months. He testified he repeatedly talked to the plant nurse about the daily pain he was experiencing at work. John Lichtenaur, Jr., admits he spoke to claimant once about his inability to perform the job.[14] Claimant decided to terminate his employment with respondent in August 2001. He concluded he could no longer continue in his job and elected to enroll in a local vocational program. This program lasted 10 months and following completion, he hoped to obtain employment in the construction industry.

When presented with all this evidence, the ALJ was uniformly persuaded by the opinions of Dr. Carabetta, the treating physician. The ALJ adopted Dr. Carabetta's 5 percent functional impairment rating as well as his opinion regarding restrictions and found a 25 percent task loss, based upon an average of Dr. Carabetta's task loss percentages using both parties' vocational analyses. The ALJ rejected the opinions offered by the other physicians, concluding them to be "unrealistic."[15]

The Board has considered the evidence offered by the parties and concludes the ALJ's Award should be affirmed in part and modified in part. The Board, as did the ALJ, finds Dr. Carabetta's opinions to be persuasive and well-supported by the medical records. Accordingly, the Board affirms the 5 percent permanent partial disability as well as the 25 percent task loss awarded by the ALJ. We must, however, focus on the remaining issue of wage loss, claimant's decision to voluntarily leave his position with respondent in August 2001 and its impact on his claim for work disability.

When an injury does not fit within the schedules of K.S.A. 1999 Supp. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 1999 Supp. 44-510e, which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a**

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[14] Lichtenaur Depo. at 17-18.

[15] ALJ Award (July 14, 2003) at 3.

> **percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[16] and *Copeland*.[17] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[18]

With respect to claimant's good faith, the ALJ concluded:

> In this case, claimant left the employment of the respondent on August 14, 2001 in order to attend Flint Hills Technical College in Emporia. Claimant testified he quit IBP because the duties of his last job were continuing to aggravate his injuries. His supervisor verified that Mr. Hernandez complained about *[sic]* to him

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[16] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[17] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[18] *Id.* at 320.

> about the pain claimant's injuries were continuing to cause when the *[sic]* Mr. Hernandez performed his job duties.
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> After completing his course work in "construction technology" claimant sought the assistance of the State Department of Social and Rehabilitation Services to obtain employment and has continued to seek employment on a weekly basis. . . . The court finds that claimant did exercise good faith to find appropriate employment in returning to school based upon the following:
>
> > 1) Claimant's previous vocational background suggests that he would have had limited value in the open labor market with restrictions on his ability to perform manual labor imposed by Dr. Carabetta and claimant's continued complaints of pain.
> >
> > 2) His pursuit of "construction technology" training was not incompatible with his previous educational background and work experience.
> >
> > 3) Claimant pursued employment in his new field once his training was finished.[19]

The ALJ concluded claimant met the "good faith" test and thus, his actual wage loss was averaged with the 25 percent task loss, yielding a work disability of 62.5 percent. The Board disagrees with this finding on the issue of "good faith".

For the last six months of his employment, claimant was assigned to a light duty position titled "space hot beef". Although claimant says he constantly complained to the plant nurse about how the job hurt his low back and caused him pain, the Board does not find his protestations entirely credible. The plant supervisor recalls claimant asserting his complaints of pain on only one occasion. No physician has testified that claimant should have abandoned his position and in fact, both Drs. Carabetta and MacMillan testified claimant could perform the "space hot beef" job. Claimant filed no formal request for additional treatment but instead, quit his job rather abruptly. Moreover, claimant's decision to pursue a new career in the construction industry, particularly in light of the restrictions imposed by Drs. Carabetta and Downs, is rather curious. If claimant cannot perform the "space hot beef" job, as he claims, it is difficult to see how claimant could credibly seek a job in the construction industry.

After considering all these facts and circumstances, the Board finds claimant failed to exercise good faith to retain appropriate employment. Claimant was earning a comparable wage at the time he decided to terminate his employment with respondent.

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[19] ALJ Award (July 14, 2003) at 3-4.

The Board finds the job of "space hot beef" was within Dr. Carabetta's restrictions and claimant had demonstrated an ability to do that job. Thus, he is not entitled to any work disability benefits under K.S.A. 1999 Supp. 44-510e(a).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated July 14, 2003, is modified as follows:

Augustin Hernandez is granted compensation from IBP, Inc., for a July 16, 1999 accident and resulting disability. Based upon an average weekly wage of $445.44, Mr. Hernandez is entitled to receive 20.75 weeks of permanent partial general disability benefits at $296.97 per week, or $6,162.13, for a 5 percent permanent partial general disability, making a total award of $6,162.13, which is all due and owing less any amounts previously paid.

All other findings and orders contained within the ALJ's Award are affirmed to the extent they are not inconsistent with the findings and orders expressed herein.

IT IS SO ORDERED.

Dated this _____ day of January, 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Anne Haught, Acting Workers Compensation Director